

SEP 2 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1977

No. 77- 338

SANDRA WETZEL and MARI ROSS, on behalf
of themselves and all others similarly situated,

Petitioners,

v.

LIBERTY MUTUAL INSURANCE COMPANY,
a corporation,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

HOWARD A. SPECTER

MICHAEL D. BUCHWACH

LITMAN LITMAN HARRIS

& SPECTER, P.A.

1701 Grant Building

Pittsburgh, Pennsylvania 15219

ROBERT F. STONE

FINE, PERLOW AND STONE

1531 Frick Building

Pittsburgh, Pennsylvania 15219

Attorneys for Petitioners

INDEX TO PETITION

	<u>Page</u>
TABLE OF CITATIONS	ii
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTORY PROVISION INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
The Court of Appeals Has Decided Important Questions of Federal Law in a Way in Conflict With Applicable Decisions of This Court	7
CONCLUSION	12

INDEX TO APPENDIX

Opinion of the court of appeals (July 1, 1977)	1a
Judgment of the court of appeals (July 1, 1977)	4a
Order of the court of appeals sur petition for rehearing (July 26, 1977)	6a
Order of the district court (August 24, 1976)	7a
Opinions of the district court (January 9, 1974 and February 20, 1974)	9a
Order of the district court (January 9, 1974)	43a

TABLE OF CITATIONS

CASES

	<u>Page</u>
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975)	10
<i>Arlington Heights v. Metropolitan Housing Development Corp.</i> , 429 U.S. 252 (1977)	9
<i>Continental T.V., Inc. v. GTE Sylvania, Inc.</i> , 97 S.Ct. 2549 (1977)	11
<i>Dothard v. Rawlinson</i> , 97 S.Ct. 2720 (1977)	10
<i>General Electric Co. v. Gilbert</i> , 429 U.S. 125 (1976)	2, 7, 9, 10, 11
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971)	10
<i>International Brotherhood of Teamsters v. United States</i> , 97 S.Ct. 1843 (1977)	9, 10
<i>Liberty Mutual Insurance Co. v. Wetzel</i> , 424 U.S. 737 (1976)	7
<i>Liberty Mutual Insurance Co. v. Wetzel</i> , 429 U.S. 1000 (1976)	10
<i>Wetzel v. Liberty Mutual Insurance Co.</i> , 508 F.2d 239 (3d Cir. 1975), <i>cert. denied</i> , 421 U.S. 1011 (1975)	6
<i>Wetzel v. Liberty Mutual Insurance Co.</i> , 511 F.2d 199 (3d Cir. 1975), <i>vacated</i> , 424 U.S. 737 (1976)	6

STATUTES

28 U.S.C. §1254(1)	2
Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e-2000e-17	<i>passim</i>

Supreme Court of the United States

October Term, 1977

No. 77-

SANDRA WETZEL and MARI ROSS, on behalf
of themselves and all others similarly situated,

Petitioners,

v.

LIBERTY MUTUAL INSURANCE COMPANY,
a corporation,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioners, Sandra Wetzel and Mari Ross, on behalf of themselves and all others similarly situated, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on July 1, 1977, which vacated a portion of the partial summary judgment of the United States District Court for the Western District of Pennsylvania entered in favor of Petitioners on January 9, 1974, which vacated the injunction of that district court entered in favor of Petitioners on August 24, 1976, and which entered judgment in favor of the Respondent on part of the Petitioners' claims.

OPINIONS BELOW

The following opinions and orders are printed in the Appendix to this Petition:

1. Opinion of the court of appeals dated July 1, 1977 (unreported) (1a);¹
2. Order of the court of appeals sur petition for rehearing dated July 26, 1977 (unreported) (6a);
3. Order of the district court dated August 24, 1978 (unreported) (7a);
4. Opinions of the district court dated January 9, 1974, and February 29, 1974 (9a). The opinions are officially reported at 372 F.Supp. 1146 (W.D.Pa. 1974).
5. Order of the district court dated January 9, 1974 (unreported) (43a).

JURISDICTION

The opinion and judgment of the court of appeals were entered on July 1, 1977. The order of the court of appeals denying Wetzel and Ross' petition for rehearing was entered on July 26, 1977. This Petition is filed within ninety days thereafter. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Does this Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), preclude a female employee whose employer's income protection plan excludes coverage for pregnancy-related disabilities from establishing a violation of Title VII of the Civil Rights Act of 1964, as amended, by demonstrating either that the exclusion

¹— "a" references are to the designated page numbers of the Appendix.

was the result of a mere pretext designed to effect an invidious discrimination against women or that the exclusion has a gender-based discriminatory effect because it results in the plan's being worth more to men than to women or otherwise?

STATUTORY PROVISION INVOLVED

The statutory provision involved is Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a). The statute provides:

§2000e-2. Unlawful Employment Practices Employer Practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

STATEMENT OF THE CASE

Petitioners, Sandra Wetzel and Mari Ross, brought this action as a class action on behalf of a class of female employees of Respondent, Liberty Mutual Insurance Company, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e-2000e-17, to obtain injunctive, declaratory and monetary relief against their employer's policies and practices which discriminated on the basis of sex. Respondent, Liberty Mutual Insurance Company, is an insurance underwriting company with offices throughout the United States. Petitioners commenced this action in February, 1972, at a time when Mari Ross was on a maternity leave of absence. Petitioners challenged their employer's hiring and promotion practices, its pregnancy-related employment practices and its practice of providing disparate compensation for certain "male" and "female" jobs.

The practice which the court of appeals held not to be a violation of Title VII involves the Income Protection Plan to which Respondent's employees must subscribe as a condition of employment. The Income Protection Plan affords "insurance" benefits and "supplementary salary" benefits to the company's disabled employees for all medically verifiable disabilities. Other than those disabilities resulting from acts of war or intentionally self-inflicted injuries, only disabilities resulting from pregnancy or childbirth or complications therefrom are excluded from coverage. The plan has always been contributory, and the employee's mandatory contribution has ranged from approximately one-third to fully one-half the cost of coverage of the insurance benefits. The amount of the insurance benefits is based on a percentage of salary up to a maximum level. The company pays supplementary salary benefits in the amount of the employee's full salary for the

first week of disability and one-half the difference between full salary and the insurance benefits for as many weeks thereafter as the employee has completed years of service.

Until March, 1967, the company discharged pregnant employees after the sixth month of pregnancy. In March, 1967, the company modified its practice slightly so that pregnant employees were not fired until after the eighth month of pregnancy. These automatic terminations with no right to reemployment continued until September, 1970, when the company began to impose unpaid leaves of absence as an alternative to mandatory discharge. Employees were placed on forced leaves of absence after the eighth month of pregnancy and required to return to work no later than six months from the commencement of the leave or three months from the date of delivery, whichever came first. This practice was modified in November, 1971, after Petitioners' charges of discrimination were filed with the Equal Employment Opportunity Commission, to enable a pregnant employee to work for as long as her physician verified her ability to continue prior to delivery. The mandatory return dates, which were applied without regard to disabling complications, remained in force until after the court of appeals' initial affirmance of the district court's order holding that this practice violated Title VII. These mandatory discharge, leave and return date practices applied to no disabilities other than pregnancy-related ones.

Discovery of a statistical nature concerning hiring and promotion revealed that 99.99% of the 3,129 persons hired for the job of Claims Adjuster during nearly seven years following the effective date of Title VII were men, and that 98.84% of the 2,329 persons hired for the lower paid position of Claims Representative during the same time period were women. The starting salary differential between the two

positions was approximately \$2,500 per year. Discovery also disclosed that no employee could gain any position in the claims department above that of Claims Adjuster without first becoming a Claims Adjuster, a position limited to men.

Wetzel and Ross moved for summary judgment on the issue of liability as to the hiring and promotion practices and the pregnancy-related practices. The only explanation which the company ever gave for its pregnancy-related employment practices consisted of the deposition testimony of its Manager of Personnel Services who swore that each of the practices was adopted "on advice of counsel."² The company refused to offer any evidence of its own subjective basis for the pregnancy-related practices. It was equally silent concerning the reasons for its hiring and promotion practices despite earlier assurances of a full explanation.³ On January 9, 1974, the trial court declared the challenged pregnancy-related and hiring and promotion practices violative of Title VII (43a).⁴

Respondent then took two appeals. In *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239 (3d Cir. 1975), the court of appeals affirmed the trial court's decision on the hiring and promotion practices and the class action ruling except insofar as the class definition was altered to exclude past employees whose claims were held to be time barred. Cross petitions for writs of certiorari were denied by this Court. 421 U.S. 1011 (1975).

In *Wetzel v. Liberty Mutual Insurance Co.*, 511 F.2d 199 (3d Cir. 1975), the court of appeals affirmed the district

²Deposition of Kenneth B. Spaulding, October 17, 1972, p. 17.

³As the court of appeals observed, "The time for explanation has come and gone." *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 259 (1975), *cert. denied*, 421 U.S. 1011 (1975).

⁴Petitioners' third Title VII claim, that of discriminatory compensation, was never the subject of a motion for summary judgment, but was tried to the district court sitting without a jury and is *sub judice*.

court's decision on the mandatory return date and Income Protection Plan.⁵ On writ of certiorari, this Court concluded that no appealable order had been entered by the district court, vacated the judgment of the court of appeals and remanded the case to the court of appeals with instructions to dismiss the appeal. *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976).

Subsequent to the dismissal of the appeal and remand to the district court, the trial court granted injunctive relief as to Respondent's Income Protection Plan (7a). Thereafter, this Court rejected the company's attempt to seek immediate review of the injunction. *Liberty Mutual Insurance Co. v. Wetzel*, 429 U.S. 1000 (1976). After briefing and oral argument, the court of appeals concluded that this Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), required not only vacating the district court's injunctive decree, but also entering judgment for Respondent with respect to the lawfulness of the Income Protection Plan under Title VII (1a). Wetzel and Ross filed a timely petition for rehearing which the court of appeals denied (6a).

REASONS FOR GRANTING THE WRIT

The Court of Appeals Has Decided Important Questions of Federal Law in a Way in Conflict With Applicable Decisions of This Court.

The court of appeals' decision conflicts with applicable decisions of this Court relating to the validity of employers' income protection plans under Title VII, the manner in which a plaintiff in a Title VII case may demonstrate a *prima facie* case, and the fundamental difference between a case

⁵The company did not seek appellate review of the district court's ruling with respect to the mandatory discharge or leave practices relating to pregnancy.

which has been decided on a motion for summary judgment and one which has been adjudicated after trial on a full record.

As established unequivocally in the record, Petitioners' motion for partial summary judgment was based and granted solely upon the *language* of the company's Income Protection Plan which excludes coverage for pregnancy-related disabilities, as corroborated by the deposition testimony of Kenneth B. Spaulding, the company's Manager of Personnel Services. No factual record exists relative to the history and development of the plan, the value of the plan, the effect of the plan alone on the employment opportunities of females, or the relative effect of the plan in conjunction with the employer's other pregnancy-related and hiring and promotion practices on the employment opportunities of females. The only explanation in the record which the employer ever gave for the exclusion was Mr. Spaulding's testimony that the practice was adopted "on advice of counsel."

In its decision, the court of appeals stated that *Gilbert* "holds that a disability income plan excluding pregnancy benefits does not violate Title VII"(3a) and that "[t]he plan under consideration there is indistinguishable in any relevant provision from that offered by Liberty Mutual"(3a). The court concluded therefore that "*Gilbert* requires that we reverse and enter judgment for the defendant on the disability income benefits issue"(3a). The result of the court of appeals' ruling is to hold that a female employee never has the right to demonstrate, on a full and proper record, that a specific employer's pregnancy-related exclusion of benefits from a disability income protection plan was adopted either for the purpose of discriminating against female employees or had a resulting adverse effect on female employees.

Petitioners respectfully submit that this Court's decision in *Gilbert* does not contemplate or countenance this ruling.

In *Gilbert*, this Court determined that it was necessary to show a gender-based discrimination or a gender-based effect in order to establish a violation of §703 (a). *General Electric Co. v. Gilbert*, *supra* at 137-138 n. 15. Furthermore, this Court found that the employees in that case had made "no . . . showing . . . that the exclusion of pregnancy benefits is a mere pretext designed to effect an invidious discrimination against the members of one sex or the other." *Id.*, at 135. (Emphasis supplied.) Finally, this Court declined to "*infer* that the exclusion of pregnancy disability benefits from petitioner's plan is a simple pretext for discriminating against women." *Id.*, at 136. (Emphasis supplied.) This Court's above statements clearly reveal that the existence of gender-based discrimination is a factual question, incapable of resolution by a district court, and surely not by a court of appeals, on *Petitioners'* motion for summary judgment on the present record. Certainly, Petitioners' proof of the company's post-Act discriminatory hiring and promotion practices is competent proof of the company's intent to discriminate against Petitioners and the class. *Cf.*, *International Brotherhood of Teamsters v. United States*, 97 S.Ct. 1843 (1977). Similarly, Petitioners contend that proof of their employer's other pregnancy-related practices held violative of Title VII evidences that same intent to discriminate against women. Petitioners are entitled to the inference at trial that the pregnancy exclusion in issue here was adopted because of the employer's intent to discriminate against women. This Court has ruled previously, in other civil rights cases, that intentional discrimination in one area supports an inference of intentional discrimination in another area. *Keyes v. School District No. 1*, 413 U.S. 189, 207-208 (1973); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-268 (1977). Such reasoning applies

equally here, especially where no factual determination was made concerning what the employer's "policy" is.⁶

Consistent with both earlier⁷ and later⁸ pronouncements of this Court, *Gilbert* also affirmed the validity of proving a *prima facie* Title VII violation by demonstrating an adverse impact against a protected class. This Court acknowledged that the plaintiffs in *Gilbert* had "not attempted to meet the burden of demonstrating a gender-based discriminatory effect resulting from the exclusion of pregnancy-related disabilities from coverage." *General Electric Co. v. Gilbert*, *supra* at 137. The Court stated further:

As there is *no proof* that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability benefits plan is less than all inclusive. *Id.*, at 138-139. (Emphasis supplied.)

It is apparent, therefore, that even the majority in *Gilbert* would not deny a female employee an opportunity to

⁶The court of appeals determined that "[t]he income protection plan is clearly severable from the hiring and promotion practices of the company." The record lacks any support for this factual conclusion, again made in violation of established summary judgment principles articulated by this Court. Conceivably, the employer's "policy" may have been to discriminate against women in every manner thought possible. Thus, the employer may have implemented that policy by adopting specific "practices" designed to discriminate against women. While the record may not conclusively demonstrate the existence of this hypothesis so as to entitle Petitioners to summary judgment, surely this hypothesis is not so inconsistent with the record as to allow summary judgment for Respondent.

⁷*Griggs v. Duke Power Co.*, 401 U.S. 424, 429-432 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

⁸*International Brotherhood of Teamsters v. United States*, *supra* at 1854 n. 15; *Dothard v. Rawlinson*, 97 S.Ct. 2720, 2726 (1977).

establish a gender-based discriminatory effect based upon, *inter alia*, proof of different values of the plan to males and females. Certainly, the concurring opinions in *Gilbert* buttress Petitioners' position that *Gilbert* does not question the established modes of proving Title VII violations. The denial of at least a remand to develop an appropriate record has deprived Petitioners of the opportunity to demonstrate either that the Income Protection Plan, in isolation, has a gender-based discriminatory effect, or that the plan, combined with other pregnancy-related and hiring and promotion practices, has that proscribed effect.

The basic holding of *Gilbert* is that an exclusion like the one in this case is not *per se* violative of Title VII. The court of appeals tortured this holding to preclude proof of a Title VII violation under any circumstances.⁹ Essentially, the court of appeals treated the employees' allegations as if they were challenged by a motion to dismiss under circumstances where this Court had ruled that proof of purposeful gender-based discrimination or gender-based discriminatory effect would not entitle a Title VII plaintiff to prevail. Petitioners respectfully submit that this Court has held to the contrary and that their Petition should be granted to resolve a question in an area which this Court has found sufficiently important to grant other petitions, including one filed earlier herein.

⁹Just as in the antitrust context conduct which is not *per se* violative of the Sherman Act may nonetheless be found unlawful depending on, *inter alia*, the purposes and effects of the acts, conduct which is not *per se* violative of Title VII can be violative of Title VII. The court of appeals' decision in this case is analagous to a decision wherein a lower court would find, based upon *Continental T.V., Inc. v. GTE Sylvania Inc.*, 97 S.Ct. 2549 (1977), that an antitrust challenge to a location clause identical in language to that challenged in the *Sylvania* case must be rejected summarily. Neither that result nor the one in this case should be tolerated by this tribunal.

*Conclusion***CONCLUSION**

For the reasons stated above, Sandra Wetzel and Mari Ross, on behalf of themselves and all others similarly situated, pray that their Petition for a Writ of Certiorari be granted so that this Court can review the significant question presented herein on the merits.

Respectfully submitted,

HOWARD A. SPECTER

MICHAEL D. BUCHWACH

LITMAN LITMAN HARRIS

& SPECTER, P.A.

1701 Grant Building

Pittsburgh, Pennsylvania 15219

ROBERT F. STONE

FINE, PERLOW AND STONE

1531 Frick Building

Pittsburgh, Pennsylvania 15219

Attorneys For Petitioners

Dated: September 1, 1977

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-

SANDRA WETZEL and MARI ROSS, on behalf
of themselves and all others similarly situated,

Petitioners,

v.

LIBERTY MUTUAL INSURANCE COMPANY,
a corporation,

Respondent

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

HOWARD A. SPECTER

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& SPECTER, P.A.

1701 Grant Building

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ROBERT F. STONE

FINE, PERLOW AND STONE

1531 Frick Building

Pittsburgh, Pennsylvania 15219

Attorneys For Petitioners

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 76-2240

SANDRA WETZEL and MARI ROSS, on behalf
of themselves and all others similarly situated,
Plaintiffs-Appellees

v.

LIBERTY MUTUAL INSURANCE COMPANY,
a corporation,
Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 72-169)

Argued June 7, 1977

Before: WEIS, *Circuit Judge*, CLARK,* *Associate Justice* and
GARTH, *Circuit Judge*.

OPINION OF THE COURT
(Filed July 1, 1977)

*The Honorable Tom C. Clark, Associate Justice, Supreme Court of the United States (Retired), sitting by designation, heard the oral argument and participated in the decision in this case but died before the opinion was written.

PER CURIAM:

On January 9, 1974, the United States District Court for the Western District of Pennsylvania entered partial summary judgment in favor of the plaintiffs on their claim that defendant's policy of denying disability income plan benefits to female employees violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000(e), *et. seq.* On certiorari, the Supreme Court concluded that even though a Fed. R. Civ. P. 54(b) certification had been granted, the order was not appealable since no relief had been granted, *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737 (1976). The district court then afforded a hearing, and, on August 24, 1976, issued an injunction, enjoining defendant from using or implementing its protection benefits plan which treated "pregnancy related disabilities differently from other disabilities and which does not provide coverage or other benefits for pregnancy related disabilities." The defendant was also prohibited from avoiding the effect of the order by reducing coverage to male employees. Finally, the court ordered the defendant to submit a new income protection plan which would provide coverage for pregnancy related disabilities.

The defendant has appealed to this court under the provisions of 28 U.S.C. §1292. We have jurisdiction to consider the matter.

After the appeal had been lodged in this court, the Supreme Court decided *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). We find that decision to be dispositive of the issues raised in the case *sub judice*.

The plaintiffs argue that in addition to a claim of discrimination based upon deprivation of benefits because of pregnancy there has been proof of disparate treatment in hiring and promotional policies. Accordingly, the income benefit plan, they contend, should not be viewed in isolation

and the case should be remanded for further consideration in the light of *Gilbert*. We are unable to accept this position. The income protection plan is clearly severable from the hiring and promotion practices of the company. The district court's injunction itself demonstrates no difficulty in separating the disability plan from other issues in the litigation.

General Electric Co. v. Gilbert, *supra*, holds that a disability income plan excluding pregnancy benefits does not violate Title VII. The plan under consideration there is indistinguishable in any relevant provision from that offered by Liberty Mutual. Therefore, we conclude *Gilbert* requires that we reverse and enter judgment for the defendant on the disability income benefits issue. *EEOC v. Children's Hospital of Pittsburgh*, ___ F.2d___ (Nos. 76-2321 and 2322, 3d Cir. May 19, 1977). We do not consider any other phase of the case.

Accordingly, that portion of the partial summary judgment of January 29, 1974 pertaining to the disability income protection plan and the injunction and order of August 24, 1976 will be vacated. Judgment will be entered in favor of the defendant on the plaintiffs' claims that the defendant's income protection plan was in violation of Title VII. Costs taxed against appellees.

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 76-2240

SANDRA WETZEL and MARI ROSS, on behalf of
themselves and all others similarly situated,
Equal Opportunity Commission as amicus curiae

vs.

LIBERTY MUTUAL INSURANCE COMPANY,
a corporation,

Appellant

(D. C. Civil No. 72-169)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: WEIS, *Circuit Judge*, CLARK*, *Associate Justice* and
GARTH, *Circuit Judge*

JUDGMENT

This cause came on to be heard on the record from the
United States District Court for the Western District of
Pennsylvania and was argued by counsel on June 7, 1977.

On consideration whereof, it is now here ordered and
adjudged by this Court that the portion of the judgment of
the said District Court filed January 29, 1974, pertaining to

*The Honorable Tom C. Clark, Associate Justice, Supreme Court of
the United States (Retired), sitting by designation, heard the oral
argument and participated in the decision in this case but died before the
opinion was written.

the disability income protection plan be, and the same is
hereby vacated. The injunction and order of the said District
Court filed August 24, 1976, be, and the same is hereby
vacated. Judgment is hereby entered in favor of the
defendant on the plaintiffs' claims that the defendant's
income protection plan was in violation of Title VII of the
Civil Rights Act of 1964. Costs taxed against appellees.

ATTEST:

/s/ THOMAS F. QUINN

Clerk

July 1, 1977

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 76-2240

SANDRA WETZEL and MARI ROSS, on behalf
of themselves and all others similarly situated,
Plaintiffs-Appellees

v.

LIBERTY MUTUAL INSURANCE COMPANY,
a corporation,
Defendant-Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS,
ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*.

The petition for rehearing filed by

Appellees

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ JOSEPH F. WEIS, JR.

Judge

Dated: July 26, 1977

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

SANDRA WETZEL and MARI ROSS,
on behalf of themselves and
all other persons similarly
situated,

Plaintiffs,

vs.

LIBERTY MUTUAL INSURANCE
COMPANY, a corporation,
Defendant

Civil Action
No. 72-169

ORDER

NOW this 24 day of August, 1976, partial summary judgment, interlocutory in character, having been entered by Order of January 9, 1974, it is ordered, adjudged and decreed, in furtherance of this Court's judgment, as follows:

1. The Defendant is hereby enjoined from further pursuing, using or implementing its existing or any other income protection or benefit plan which treats pregnancy-related disabilities differently from other disabilities and which does not provide coverage or benefits for pregnancy-related disabilities.

2. The Defendant is hereby enjoined from avoiding the effects of this Order, directly or indirectly, by pursuing, utilizing or implementing any plan which in any way equalizes coverages or benefits available to males and females by reducing any coverages or benefits which are or have been available to male employees under the terms of the employment practices or policies which existed at the time summary judgment was granted.

3. The Defendant is hereby directed to implement and submit to the Court and Plaintiffs' counsel within thirty (30) days following the date of this Order, a written income protection plan with provisions no less favorable than those which were in existence and were declared violative of Title VII by this Court's January 9, 1974 Order, but under which coverage for pregnancy-related disabilities is provided on the same terms as coverage for other disabilities.

This Order shall become effective thirty (30) days from the date of entry thereof.

The motion of defendant to supplement the record is denied.

/s/ GERALD J. WEBER

GERALD J. WEBER
United States District Judge

Entered at Pittsburgh, Pa
this 24th day of Aug 1976
at 11:50 AM

United States District Court

W. D. PENNSYLVANIA.

Jan. 9, 1974.

ON MOTION TO RECONSIDER FEB. 20, 1974.

Sandra WETZEL and Mari Ross
on behalf of themselves and all others
similarly situated, Plaintiffs,

v.

LIBERTY MUTUAL INSURANCE
COMPANY, a corporation, Defendant.

Civ. A.
No. 72-169.

OPINION

WEBER, District Judge.

The two named Plaintiffs on behalf of themselves and all other female technical employees employed in Defendant Liberty Mutual Insurance Company's Claims Department (the Company) have filed a Complaint charging that the Company discriminated against women in hiring, job classification, promotions, and in the compensation and job benefits they received for the jobs they were allowed to hold.

The Representative Plaintiffs are Sandra Wetzel, a woman, who was hired by Defendant Company as a "Claims Representative" in July 1967, and Mari Ross, who was hired by Defendant Company as a "Claims Representative" in September 1967. Both allege that they suffered discrimination by reason of their sex because of the hiring, job classification, pay differential, and employment benefit policies of Defendant Company and that these policies were applied to all female technical employees in the Defendant's Claims Department throughout the nation where Defendant Company did business.

The court determined that the action should proceed as a class action covering all female technical employees in the Defendant's Claims Department in the entire geographical area where the Company did business. The class as now defined includes all such employees who were hired or working for the Company in its Claims Department since July 2, 1965, the effective date of Title VII of 42 U.S.C. §2000e et seq., the Equal Employment Opportunity Act of 1972.

Extensive discovery has been employed and the Plaintiffs now file a motion for partial summary judgment on certain of the issues raised. It is agreed between the parties that one of the issues, designated the "equal pay" issue, is not susceptible of summary judgment at this time because there are disputed issues of fact with respect to whether or not the work performed by women in the job classification of "Claims Representative" was equal to the work performed by men in the job classification of "Claims Adjuster" for which they were paid a substantially higher salary. However, the Plaintiffs at this time allege that there is no genuine issue as to any material fact with respect to the job classification under which men and women were originally hired as technical employees in the Claims Department, with regard to the promotional policy within the Claims Department, and with regard to the pregnancy and maternity leave policies of the Company including the disability income protection plan of the Company as applied to women on maternity leave.

The key point of discrimination set forth in the pleadings, evidentiary material and briefs of the plaintiffs, and the *amicus curiae* brief of the United States Equal Employment Opportunity Commission is the hiring policy of the Company, since original assignment in effect determines the employee's future chances of promotion

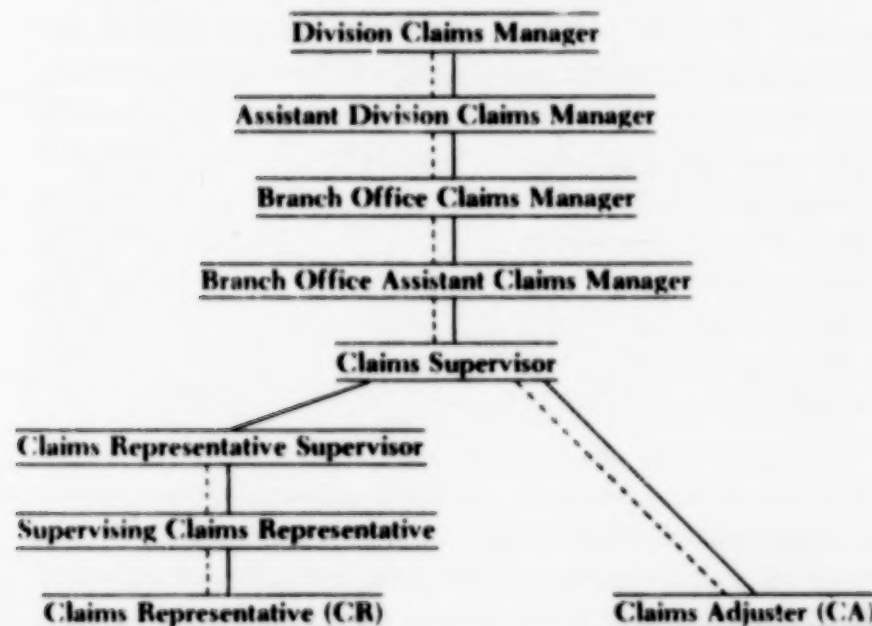
within the Company. Because the Company in its Claims Department promotes from its own ranks, the opportunity for advancement depends upon the entry level position to which an employee is assigned upon first being employed by the Company's claim division. Promotion to the higher rank of Claims Supervisor was limited to persons holding the position of Claims Adjuster and throughout most of the period under consideration through 1970 was limited to male employees because all Claims Adjusters were male. On the other hand the entry level classification in the Company's Claims Department of "Claims Representative" was exclusively limited to women throughout most of the period under consideration here. There was no avenue of promotion to Claims Supervisor and higher supervisory positions from those personnel classified as "Claims Representatives" on entry into the Company in its Claims Division.

There were two higher supervisory positions in the "Claims Representative" category, that of "Supervising Claims Representative" and "Claims Representative Supervisor", but no promotion beyond the second rank. Although the line of responsibility from "Claims Representative Supervisor" runs to "Claims Supervisor" there is no similar line of promotion because all "Claims Supervisors" are drawn from the ranks of "Claims Adjuster".

The lines of responsibility and promotion are illustrated as follows:

CLAIMS DEPARTMENT - TECHNICAL EMPLOYEES

Lines of Responsibility and Promotion



lines of responsibility _____
 lines of promotion - - - - -

The same educational requirements were in 1965 and thereafter until 1970 with respect to the hiring of "Claims Adjusters" and "Claims Representatives", a college degree. No prior experience in the insurance business was required and in fact the Company did not hire persons who had worked for other insurance companies in its entry level positions in the Claims Department.

Although the Defendant Company had employed "Claims Adjusters" for a long period of time the position of "Claims Representative" was created in mid-1965. The

position was created when the Company had decided to handle more of its claims work from inside its offices. A recruiting brochure for this position was prepared and circulated through college placement offices and employment agencies. The qualification for the "Claims Representative" position included a college degree. The recruiting brochure is entirely female oriented. Its title page bears the caption and picture identifying the position as a job fit for a queen. It shows women in its illustrations of persons performing their duties in this capacity. Between July 1, 1965 and the end of 1966, 401 persons were hired for the positions of "Claims Representative", not one of which was male. Between July 1, 1965 and March 17, 1972, 2,329 persons were hired as "Claims Representatives" of which 2,302 or 98.84% were women. The first male "Claims Representative" was hired in 1969, four in 1970, and twenty in 1971. During the period from 1965 until the end of 1970, the Company hired over 2,000 "Claims Adjusters", not one of which was female.

The recruiting brochure used by the Company during this period describing the position and duties of "Claims Adjusters" was entirely male oriented, its illustrations showing men performing the duties of the position, and bearing the legend in large type, "Are you the right man?", and reciting the avenues of advancement from Claims Adjuster through Branch Office Claims Manager, Division Claims Manager, Manager Home Office Examiners' Division, and so on up the ladder. The Company promoted to advanced positions in its Claims Department solely from those persons who had served it in the capacity of "Claims Adjuster".

The two Representative Plaintiffs were hired in the position of "Claims Representative" and they have deposed that in answer to their inquiries they were informed that the position of "Claims Adjuster", the beginning of the

promotional ladder in the Claims Department, was not available for women. It has been admitted by representatives of the Defendant that the two named Representative Plaintiffs were qualified for the position of "Claims Adjuster" at the time of the original hiring.

It would serve little purpose to recite in detail the great mass of statistical evidence which the Plaintiffs have produced in support of their contention that the two initial entry positions were segregated between male and female applicants, that the educational requirement for both positions was the same, that no prior insurance experience was required for either position, that the functions performed in these positions were very similar, that the pay differential between the positions was substantial, being approximately \$2,500 per year greater for the Claims Adjuster, that prior to 1971 no opportunity was given to women "Claims Representatives" to qualify for the position of "Claims Adjuster", and that all promotions to higher positions in the Claims Department were made from the ranks of the exclusively male "Claims Adjuster" classification.

In addition to the statistical evidence which is un rebutted here the Plaintiffs have produced additional supporting evidence of the Company's employment policies with respect to women in the Claims Division. Much of this evidence is in the form of oral testimony and affidavits which may be subject to a question of credibility but a good deal of the supporting evidence is documentary and supports the Plaintiffs' contention of a recognized pattern of treating the male and female employees in the Claims Department differently in respect to recruitment, hiring classifications, promotional opportunities, and salary.

We are not speaking of salary or compensation with respect to the question of whether equal pay was given for

the same work but in connection with the entry level salary paid for the two classifications and the salary differential between "Claims Representatives" of considerable experience and the starting salary which they could receive when openings were finally made available to "Claims Representatives" to become "Claims Adjusters".

Two sections of Fed.R.Civ.P. 56 are applicable to our consideration of Plaintiffs' motion for summary judgment. Fed.R.Civ.P. 56(c) provides in part:

"The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and [the] admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law."

and Fed.R.Civ.P. 56(e) which provides in part:

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits, or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The Plaintiffs have relied chiefly on statistical evidence in support of their contention of discriminatory employment policies and in many cases the courts have accepted such evidence in determination of whether Title VII has been violated. *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 [8th Cir. 1970]; *Witherspoon v. Mercury Freight Lines, Inc.*, 457 F.2d 496 [5th Cir. 1972]; *Bing v. Roadway Express, Inc.*, 444 F.2d 687 [5th Cir. 1971]; *Rowe v. General Motors Corp.*, 457 F.2d 348 [5th Cir. 1972]. In accordance with these decisions and under the doctrine of *McDonnell*

Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 [1973], once the plaintiff has established a prima facie case by setting forth statistics of this kind the burden is on the employer to sufficiently explain the disparity in hiring; conclusory statements that the employer never discriminated in hiring is insufficient to satisfy this burden. As stated in *McDonnell*, supra, "The burden then must shift to the employer to articulate some legitimate, non-discriminatory reason for the respondent's rejection." (p. 802, 93 S.Ct. p. 1824). We are of the opinion that the Defendant's response to the Plaintiffs' motion for summary judgment fails to address this burden at all, let alone rebut the Plaintiff's evidence.

The response of the Defendant raises eight issues of defense, as follows:

1.

Neither of the named Representative Plaintiffs is currently in the employ of the Defendant. This is not a contested issue of fact. The Plaintiffs admit that both the representative party Plaintiffs have left the employ of Defendant and the question of whether or not their termination from employment was voluntary or forced by discriminatory employment practices of the Defendant is not an issue before us at this time. This is a matter of law concerning standing and it has been held that a former employee may bring an action to enforce rights under this statute claimed to have been infringed. In *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 [3rd Cir. 1971] this contention was rejected;

"The national public policy reflected . . . in Title VII . . . may not be frustrated by the development of overly technical judicial doctrines of standing or election of remedies. If the plaintiff is sufficiently aggrieved so that he claims enough injury in fact to present a genuine case

or controversy in the Article III sense, then he should have standing to sue in his own right and as a class representative." (pp. 446, 447).

The Circuit Court continued:

"A person claiming to be aggrieved may never have been an employee of the defendant. Indeed the Act forbids discrimination not only by employers, 42 U.S.C. §2000e-2(a)(2), but also by potential employers, 42 U.S.C. §2000e-2(a)(1), by labor organizations, 42 U.S.C. §2000e-2(c), and by employment agencies, 42 U.S.C. §2000e-2(b). An aggrieved person obviously is any person aggrieved by any of the forbidden practices. (pp. 445-446).

An interesting commentary on the argument asserted to this court was made in *Reed v. Arlington Hotel Co., Inc.*, 476 F.2d 721 [8th Cir. 1973]:

"... if this kind of an individual [a discharged employee, not seeking reinstatement] would be prevented from bringing class actions as the rules permit, there would be a windfall for the employer, and when any such matter was coming up, all they would have to do is discharge the employee . . ." (p. 723).

2.

The Defendant argues that the representative party Plaintiffs were offered "Claims Adjuster" status and has filed evidence to this effect. This is not denied by Plaintiffs but they contend that the terms of the offer were unacceptable and were made after the charges of discrimination were filed in this case with the United States Equal Employment Opportunity Commission in 1971. We find this to be a disputed issue of fact which may be relevant to the question of damages of the representative party Plaintiffs, but irrelevant to the question of violation of the statute which is

before us. Under all circumstances, it is shown by the evidence that the offer of "Claims Adjuster" status was made long after the effective date of the statute in question, after both representative Plaintiffs had been employed in the positions of "Claims Representatives" for several years, and after the filing of the Complaints before the EEOC in this matter.

3.

Defendant claims that there is a dispute as to the content of conversations between representatives of the Company and a representative of the Pennsylvania Human Relations Commission. This alleged conversation bears on the Company's motive and intent in offering "Claims Adjuster" status to the named-Plaintiffs at the time that it did. We find this completely immaterial to the issue before us at this time because the offer of Claims Adjuster status was not made until the alleged discriminatory practices in violation of Title VII of the Act had continued for several years and the issue had been raised by a Complaint to the Equal Employment Opportunity Commission by the named Plaintiffs.

4.

The Defendant contends that there is a disputed issue of fact on the question of whether or not the qualifications and entrance requirements for the position of "Claims Adjuster" are substantially different from those of "Claims Representative". Although with respect to the duties and responsibilities of each position which we have previously designated as the "equal pay" issue, not before the Court on this Summary Judgment motion, nevertheless we are concerned at this time with whether or not qualified female applicants were excluded from the position of "Claims Adjuster" and its subsequent promotional ladder. The statistical evidence shows that of more than 2,000 persons

hired for the position of "Claims Adjuster" up through 1970, not one was female. The Defendant's own representatives have admitted that the representative Plaintiffs in this case were qualified for the position of "Claims Adjuster" at the time of original hiring. Therefore, we find that the Defendant has not met the burden of showing why no female personnel were hired for the "Claims Adjuster" position during the period following the effective date of Title VII until sometime after August 1971 and subsequent to the filing of complaints in the within matter. Plaintiffs contention is further supported by evidence that no female employees occupied the supervisory position of "Claims Supervisor" in the Company which were filled from the ranks of the "Claims Adjusters" until at least 1970. If the jobs were substantially dissimilar as the Defendant claims, the differential in starting salary may be justified but the total exclusion of women from entry into the higher paid "Claims Adjuster" position would remain as a discriminatory practice, and the promotional policy of the company in drawing all of its supervisory personnel from the ranks of the exclusively male "Claims Adjusters" continued and emphasized the discriminatory effect of the policy. Therefore, we find that the Defendant's argument of a difference in the qualifications or duties of the two positions is immaterial to the Plaintiffs' charge that women were discriminated against in the selection of persons to fill the "Claim Adjuster" position. The company has offered no evidence of any bonafide occupational qualification to justify the complete exclusion of women for this position for over a period of five years, particularly in view of its later determination that some women "Claims Representatives" were qualified for and were offered these positions.

5.

The Defendant argues that it is not clearly established by the evidence that a large number of Defendant's female

employees were desirous of and qualified for better positions. We cannot see the materiality of this argument to the question presently before us. The undisputed evidence establishes that after charges were filed in this case, the Defendant did interview its "Claims Representatives" and that 10% of them were offered and accepted positions as "Claims Adjusters". It was further established by testimony of a Company representative that the Company considered one-third of its women "Claims Representatives" to be qualified for the position of "Claims Adjuster". We fail to see how these facts alter the statistical evidence that of the more than 2,000 "Claims Adjusters" hired between 1965 and 1970 none were women, that all of the "Claims Representatives" hired during this period were women, that no woman in the job classification of "Claims Representative" was ever promoted to the supervisory position of "Claims Supervisor" during this period; that the Company deliberately engaged in the recruitment of women for the "Claims Representative" position and represented the "Claims Adjuster" position to be solely a position for male applicants.

6.

The Defendant objects to using the import of the recruiting brochures which were offered in evidence by Plaintiffs and has shown that they have since been superseded by new recruiting literature that is not sex oriented. However, in this matter as in several other matters offered in defense in this case the evidence shows that the Company policy changed after having been continued for a period of approximately five years from the effective date of Title VII and after the threat of the instant litigation became imminent. While the change in Company policy may affect the question of the amount of damages for which it may be liable, we cannot see what effect it has on the liability of Defendant for its policy from and after July 2, 1965.

7.

The Defendant disputes the Plaintiffs' statement that Defendant discouraged acceptances for the offer given to female "Claims Representatives" for re-classification to the position of "Claims Adjuster". We do not find this to be a dispute on a material issue of fact. Whether or not the company discouraged its female "Claims Representatives" from accepting the offered position of "Claims Adjuster", after that occupational classification was opened to women is immaterial to the issue of whether or not the Company practiced discrimination in its employment policies from and after July 2, 1965.

For the purposes of this motion we may assume that the Company did not discourage its female employees from accepting offers to transfer to the classification of "Claims Adjuster."

8.

The Defendant disputes the inferences which the Plaintiffs draw from the facts that no women were promoted to the positions of Branch Office Claims Manager and above. Whether or not there is a dispute from these inferences the undisputed fact remains that no women in the Defendant's organization were promoted to or held these positions, and the Defendant has failed to come forward with any evidence to explain or refute the disparity in promotional practices.

II.

A second issue presented by Plaintiffs' motion for summary judgment may be broadly categorized as the maternity leave issue. This in turn is divided into two sub-issues which we label as

- (a) the maternity leave conditions of employment and

- (b) the income protection plan as applied to maternity leave.

(a) *Maternity leave policy.*

Until March 1967, the Company policy was to terminate the employment of a pregnant employee at the end of her sixth month of pregnancy. Thereafter, until September 1970 the policy was to terminate an employee after the eighth month of pregnancy. An employee so terminated could be re-employed, at the sole discretion of the Company, if she re-applied for employment after the birth of her child and if there was a position available.

In September 1970, Company policy was changed to require pregnant employees either to terminate employment or to take a leave of absence at the end of the eighth month and to return to work either within six months of the date of termination of employment or three months from date of delivery, whichever comes first.

In November 1971, Company policy was again changed to permit an employee to work for as long as her physician certifies her ability to work prior to commencing a maternity leave of absence.

(b) *Income Protection Policy.*

The Company provides as a fringe benefit of employment an Income Protection Plan which provides for the payment of income during periods of disability. This plan is funded by insurance benefits. The only long term disability for which no benefits are provided is pregnancy. Furthermore, the Defendant's health insurance plan provides coverage for children of employees who are working for the Company at the time of the birth of the child, and this excludes from coverage the child of an employee who is absent on a maternity leave of absence at the time of the birth of the child.

There is no disputed issue of fact as to the provisions of the maternity leave policies and the fringe benefit coverage of Defendant Company. The question presented to us is solely a matter of law as the application of Title VII to these undisputed facts.

A threshold question raised by Defendant is that the Plaintiffs have not fulfilled the statutory requirement of exhaustion of the administrative remedy, 42 U.S.C. § 2000e-5(e) because the charges filed by these Plaintiffs with the EEOC never mentioned this aspect of the complaint. The policy of the statute is to give the EEOC an opportunity to investigate and conciliate charges of discrimination.

The strongest case urged by Defendant Company is *Tedford v. Airco Reduction Co.*, 4 F.E.P. Cases 406 [5th Cir. 1972], where the Court of Appeals reversed the dismissal by the District Court of a claim for discriminatory hiring practices because of mootness. The Appeals Court held that the subsequent hiring of plaintiff did not extinguish plaintiff's claim for back wages. However, the Court of Appeals did sustain the dismissal of claims of a discriminatory seniority system and discriminatory job assignments because:

"the only factual allegation in *Tedford's* EEOC complaint was that Airco had refused to hire him as a truck driver because of his race."

• • • • •

"But giving this factual allegation the most generous construction possible, we still are unable to conclude that the investigation could properly have extended to Airco's seniority system, the driver lists, and the like. A charge filed before the EEOC is not a plenary charter for a Commission investigation of every aspect of a company's employment practices. The conclusion is unavoidable that the EEOC has never been called upon

to investigate these practices, and accordingly that litigation of their validity in federal court is premature." 4 F.E.P. Cases, p. 409.

However, this was the same Circuit Court that decided *Sanchez v. Standard Brands*, 431 F.2d 455 [5th Cir. 1970], and the *Tedford* court gave due regard to the *Sanchez* doctrine.

However, the courts have not restricted a plaintiff's suit under 42 U.S.C. § 2000e-5(e) to the specific issues raised before the EEOC, nor to the specific findings of the EEOC.

"Respondent satisfied the jurisdictional prerequisites to a federal action (i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon the Commission's statutory notice of the right to sue, 42 U.S.C. §§ 2000e-5(a) and 2000e-5(e). The Act does not restrict a complainant's right to sue to those charges as to which the Commission has made findings of reasonable cause, and we will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts. . . . and the courts of appeal have held that, in view of the large volume of complaints before the Commission and the nonadversary character of many of its proceedings 'court actions under Title VII are de novo proceedings and . . . a Commission "no reasonable cause" finding does not bar a lawsuit in the case.' *Robinson v. Lorillard Corp.*, 444 F.2d 791, 800 [C.A.4, 1971]; *Beverly v. Lone Star Lead Construction Corp.*, 437 F.2d 1136 [C.A.5, 1971]; *Flowers v. Local 6, Laborers International Union of North America*, 431 F.2d 205 [C.A.7, 1971]; *Fekete v. United States Steel Corp.*, 424 F.2d 331 [C.A.3, 1970]." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-799, 93 S.Ct. 1817, 1822, 1823, 36 L.Ed.2d 668 [1973].

In *Sanchez v. Standard Brands, Inc.*, cit. *supra*, it was explained that in filing a charge with the EEOC an aggrieved

person is supplied with a simple one-page charge form in which a row of boxes is provided to check the category of discrimination. We have as Exhibits in the present case the Notice of Charge which the EEOC gave to Defendant Company for each case which indicates "Basis of Discrimination—Sex", and "Nature of Charge—Promotion—Terms and Conditions." The *Sanchez* court found that no charging party should be barred from the assertion of a charge because of the technicality of his description.

"Surely the only procedural requirement which should confront a Title VII complainant is the requirement that he state, within the ninety-day period, *facts* sufficient to trigger a Commission investigation. 431 F.2d p. 462.

Sanchez continues:

"At least one district court in this circuit has addressed itself to the question, however, and in our judgment it responded to the question by giving the correct answer. In *King v. Georgia Power Co.*, N.D.Ga.1968, 295 F. Supp. 943, Judge Smith held that the allegations in a judicial complaint filed pursuant to Title VII 'may encompass any kind of discrimination like or related to allegations contained in the charge and growing out of such allegation during the pendency of the case before the Commission.' 295 F. Supp. at 947. In other words, the 'scope' of the judicial complaint is limited to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." 431 F.2d p. 466.

It appeared from oral argument that Defendant, although it had received the "Notice of Charge of Employment Discrimination", had not seen copies of the original charges filed by Plaintiffs with the Commission before the argument. It appeared that they had never been requested. They were supplied to the court and counsel the day following the argument on this motion. The charge of

Plaintiff Mari Ross states, inter alia, "During interview for position as claims representative was subjected to questions regarding marital situation and birth control." Furthermore, the Plaintiffs were required to pursue their charges through an appropriate state agency, the Pennsylvania Human Relations Commission, which on July 1, 1971, sent to Defendant a Complaint which recited, inter alia:

"The complainants further allege that female applicants, as a condition of hire, are subjected to inquiries about anticipated marriage and family size, while men are not similarly evaluated as a condition of hire."

(Aune, Deposition, Exhibition 1).

The court believes that the Representative Plaintiffs have properly employed the administrative procedures of Title VII which are a prerequisite to suit in the district court, they have properly raised the issue of sex discrimination in the "terms and conditions" of employment, that they specifically raised allegations of discrimination in respect to marital status and family planning sufficient to satisfy the administrative investigation requirement for raising the specific question of sex discrimination in maternity leave and pregnancy disability income policies in the present lawsuit.

As a point of departure in considering the merits of Plaintiffs' charges of sex discrimination with respect to Defendant's maternity leave and pregnancy disability income protection policies it might appear to the lay mind that we are treading on the brink of a precipice of absurdity. Perhaps the admonition of Professor Thomas Reed Powell to his law students is apt; "If you can think of something which is inextricably related to some other thing and not think of the other thing, you have a legal mind."

We are dealing with a statute enacted by the Congress of the United States which says:

"It shall be unlawful employment practices for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's ... sex; or

(2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's ... sex." 42 U.S.C. §2000e-2(a).

The defendant argues that its policies with regard to maternity leave and income protection for disability excluding pregnancy are not sex discriminatory because pregnancy is "sui generis" and thus subject to special treatment.

We believe that the court may take judicial notice of certain well known facts and statistics to illustrate the problem. We have taken our statistics from the United States Census figures as published in the 1974 edition of the World Almanac. In 1970, according to the census figures, there were 105,000,000 women and 100,000,000 men in the United States. In 1972 there were 31,000,000 women and 51,000,000 men, sixteen years of age and upwards, employed in the United States. Women between the ages of fourteen through forty-four amounted to 43.5% of the total female population or 45,675,000 women, which we equate with the childbearing age. There is a necessary overlapping of the 31,000,000 women in the work force sixteen years of age and older, and the 45,000,000 women in the childbearing ages of fourteen to forty-four. There were 3,191,000 live births in the United States in the year ending June 30, 1973 which produces a birth rate of about fifteen per 1,000 of total population, but a

fertility rate of sixty-nine births per 1,000 women fifteen to forty-four years of age. We recognize that more precise statistics are available but we are not concerned with the minutiae and only recite these figures to illustrate the scope of the problem. Pregnancy is a natural condition, it is an expectable condition, it is a statistically foreseeable condition, and ultimately it is a necessary condition. It is a condition limited to women, not by statutory law or custom, but by biological law. If three-eighths of our employee working force consists of women, and their age group necessarily overlaps in large measure the childbearing age group, pregnancy is certain to occur in a statistically expectable number of employees. We have no doubt that a large insurance company is well aware of the precise statistics. We further note from this case that the defendant's recruiting policies for female technical employees in its claims department was aimed at young women finishing their college education, and that its promotional policy was to advance personnel within its own ranks and not draw upon outside sources. This policy would only increase the incidence of young women of childbearing age among the female employees of a growing business organization such as Defendant, which hired over 2,000 new female claims representatives in a five year period.

Because pregnancy is a natural, expectable, and societally necessary condition, which is certain to occur in a statistically predictable number of women in the labor force, we see no merit in Defendant's argument that it may be excluded from equality of treatment in conditions and benefits of employment because it is a voluntary condition. Whether voluntary or not, it occurs with certainty and regularity. The distinction drawn between one hiring policy for men and another for women—each having pre-school age children—was rejected by the Supreme Court in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544, 90 S.Ct. 496, 27

L.Ed.2d 613 [1971] where there was no showing that the condition in question is a bona-fide occupational qualification necessary to the operation of that particular business or enterprise.

The United States Equal Employment Opportunity Commission which is the administrative body created by Title VII to administer the Act, has issued the following Guidelines with respect to the question at issue:

§1604.10 Employment policies relating to pregnancy and childbirth.

(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in *prima facie* violation of Title VII.

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, and accrual of seniority and other benefits or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employee of one sex and is not justified by business necessity.

29 C.F.R. Labor, Chapter XIV, Part 1604, As Amended (As of March 31, 1972).

§1604.9 Fringe benefits.

(a) "Fringe benefits," as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

29 C.F.R. *idem*.

We give full recognition to the principal urged upon us that the EEOC Guidelines, 29 C.F.R. §1604.10, effective April 5, 1972, do not have the force of law in the sense that the "regulations" or "substantive rules" of an administrative body authorized by statute to promulgate regulations to implement existing law have a binding effect. We also recognize that the Guidelines are interpretive statements of what the administrative officer thinks the regulations mean. *Gibson Wine Co. Inc. v. Snyder*, 90 U.S.App.D.C. 135, 194, F.2d 329 [1951]. We are not compelled to follow them, but some deference is due. *Espinoza v. Farah Manufacturing Co.*, 462 F.2d 1331, 1335 [6th Cir. 1972].

Our own Court of Appeals states it more strongly:

"Such an administrative interpretation is entitled to great deference. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434, 91 S.Ct. 849, 28 L.Ed.2d 158 [1971]; *Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 [1965]. That the guideline was not promulgated until after this suit was initiated is of no moment. Rights which came into being when the Act was passed are not abrogated by administrative interpretation. *Bartmess v. Drewrys U.S.A., Inc.*, 444 F.2d 1186 [C.A.7], cert.

denied, 404 U.S. 939, 92 S.Ct. 274, 30 L.Ed.2d 252 [1971]."

"A reading of the statute convinces us that the commission's interpretation furthers the legislative purpose of the Act and is consistent with the plain meaning of the language employed.

'Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 [C.A.7], cert. denied, 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543 [1971]." *Rosen v. Public Service Electric and Gas Co.*, 477 F.2d 90 [3rd Cir. 1973], at pp. 94-95.

The only current provision of the Defendant's maternity leave policy under attack is the provision that the employee who is granted a leave of absence for maternity must return to work on a date certain or be terminated from employment. Plaintiffs' Complaint is zeroed in on the target that this limitation on leave of absence for temporary disability is only applied to maternity cases. There is no such requirement for any other disability.

Because state and local governments were exempted under Title VII until 1972, there are few Title VII cases involving pregnancy that give us guidelines, but the question has arisen frequently under cases presenting claims of denial of equal protection or denial of civil rights under color of state authority. We believe that Title VII standards are more compelling on a private employer in view of the express statutory mandate upon employers and the absence of the question of a "rational basis" for classification by which a state statute is measured. *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 [1970]. While a fixed state policy of classification may survive an equal protection attack it may still be violative of Title VII. See *Schattman v.*

Texas Employment Commission, 459 F.2d 32 [5th Cir. 1972], and *Newmon v. Delta Airlines, Inc.*, 475 F.2d 768 [5th Cir. 1973].

A district court in the Fifth Circuit has recognized that:

"*Schattman*,...turned upon a divided Appellate Court's interpretation of the federal statute as it then read on the question of its exclusion from coverage of state employers and employees." *Vick v. Texas Employment Commission* 6 EPD 5990 [S.D. Tex. Aug. 30, 1973].

However, the *Vick* case found this impediment to jurisdiction removed by the 1972 Amendment to Title VII, and proceeded to find that the state's denial of unemployment benefits on the grounds that the last trimester of pregnancy rendered a woman unavailable for work, violated the provisions of Title VII.

"While the expectancy of life confined and incident to female pregnancy involves many delicacies of personal, institutional and societal interest, *Roe v. Wade*, 410 U.S. 113 [93 S.Ct. 705, 35 L.Ed.2d 147] 41 L.W. 4231 (January 22, 1973), such a natural and necessary female condition cannot be a basis for categorical discrimination in light of *Phillips* and its plain interpretation of Title VII of the Act." *Vick*, cit supra, 5 EPD p. 5992.

Nevertheless, we can take some guidelines from the Equal Protection Clause cases dealing with pregnancy.

Judge Brown in his dissent in *Phillips v. Martin Marietta Corp.*, 416 F.2d 1257 [5th Cir., 1969], vacated *per curiam* 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613 [1972] noted with respect to that case, where women with pre-school age children were denied employment, but not men:

"The distinguishing factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-

related? To the simple query the answer is just as simple: Nobody—and this includes Judges, Solomonics or life tenured—has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman". 416 F.2d p.1259.

To the argument that pregnancy is a voluntary status, the court in *Buckley v. Coyle Public School System*, 476 F.2d 92 [10th Cir.1973] says:

"The fact, if it be a fact, that pregnancy is a voluntary status really has nothing to do with the question. The point is that the regulation penalizes the feminine school teacher for being a woman and, therefore, it must be condemned on that ground." 476 F.2d at p. 95.

The Court of Appeals reversed the District Court's dismissal and remanded the case to the District Court for determination of a compelling state interest to justify the regulation.

In *Green v. Waterford Board of Education*, 473 F.2d 629 [2nd Cir.1973], the Court of Appeals reversed a District Court's dismissal of a complaint alleging that an inflexible maternity leave policy denied equal protection. Even though the District Court had found a rational basis for the school board's action, the Court of Appeals found that the state's interests were not sufficiently promoted by rule to justify the arbitrary and inflexible regulation applied to pregnancy as distinguished from other disabilities.

"The heart of plaintiff's case is that disqualifying a physically capable woman from working because of a condition related solely to her sex is unconstitutionally discriminatory. Plaintiff admits the obvious, that men do not become pregnant, but points out that men, being human, are also subject to crises of the body, some of which, like childbirth, give ample warning: A cataract operation or a prostatectomy, for example, may be planned months ahead. Because male teachers are not

forced by defendant Board to take premature leave because of a known forthcoming medical problem, female teachers should not be treated differently. Thus stated, the argument is persuasive, even compelling. One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed." (p. 634).

See also the following Equal Protection clause cases involving maternity leave: *LaFleur v. Cleveland Board of Education*, 465 F.2d 1184 [6th Cir.1972], cert. granted 411 U.S. 947, 93 S.Ct.1921, 36 L.Ed.2d 408, but Cf. *Cohen v. Chesterfield County School Board*, 474 F.2d 395 [4th Cir.1973], cert. granted, 411 U.S. 947, 93 S.Ct. 1925, 36 L.Ed.2d 408.

Defendant has interposed a defense of good faith reliance upon an administrative interpretation, particularly in its defense on the income protection exclusion policy here. This may be a matter to consider when the questions of affirmative relief or back pay are determined but we cannot see its application to the immediate question of the inflexible maternity leave standard. During the period prior to the Guidelines published in March 1972, there were no guidelines or opinions issued by the EEOC. 42 U.S.C. § 2000e-12(b) (Sec. 713(b) of the Act) provides that "no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or commission complained of was in good faith, in conformity with and in reliance upon any written interpretation or opinion of the Commission."

We do not believe that the various opinion letters referred to in the brief of *amicus curiae* United States Chamber of Commerce, with respect to the inclusion of maternity benefits in an insurance plan meet the re-

quirements of Sec. 713; there is no evidence that defendant relied upon them, they were not addressed to the defendant, and do not otherwise conform to the requirements of a written opinion under which the defense of reliance may be asserted. *Local 189 United Papermakers and Paperworkers, etc. v. United States*, 416 F.2d 980 [5th Cir.1969]; *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 [7th Cir.1971].

The maternity leave policy of the company which since 1970 has granted a leave of absence for six months from the last date of work before delivery, or for three months from date of delivery, whichever comes first, has no relation to the fitness of any individual female to perform the functions of her job.

The defendant has not alleged, nor has it offered any evidentiary material to establish that there is a disputed issue of fact dependent upon a bona fide occupational qualification. Such a bona fide occupational qualification is a defense to a charge of discrimination where sex is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. This has been narrowly construed by the courts. In *Weeks v. Southern Bell Telephone and Telegraph Company*, 408 F.2d 228 [5th Cir.1969] the Court held this must give the employer "a factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." In *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219 [9th Cir.1971] the court held the exclusion of women justified only when "the sexual characteristics of the employee are crucial to the successful performance of the job, as they would be for the position of a wet-nurse." Under *Rosenfeld*, if one woman can do the job the employer cannot impose a blanket rule denying all women the opportunity.

Under the company policy any female who cannot return to her job within three months of delivery of her child

is automatically terminated. No other disability is cause for such automatic termination. "For a woman, however, the effects of pregnancy and pregnancy-related illness are debilitating in much the same way as the physical and mental conditions that are included within the scope of the disability insurance program." *Aiello v. Hansen*, 359 F.Supp. 792 [N.D.Cal.1973].

We conclude, as a matter of law, that the maternity leave policy in effect in Defendant Company at the present time and since September 1970 in the respect in which it requires a female to return to work within three months of the date of delivery of her child, or six months from the beginning of her maternity leave, whichever date is earlier, or face termination of employment, is violative of Sec. 703, of Title VII of the Civil Rights Act of 1964, as amended, in that such policy discriminates against female employees on the basis of sex.

Because only this present policy is still in existence, injunctive relief as to this practice is appropriate at this time.

We further find that all prior company policies in effect since July 2, 1965, which compelled pregnant female employees to leave employment at a fixed period of pregnancy before delivery were likewise violative of the Act, and the company policy in effect since July 2, 1965 which denied reemployment because of pregnancy and maternity were violative of the Act. Because these practices have ended there is no need for injunctive relief, and the question of the intentional nature of the violation and the appropriate relief will be considered in a subsequent stage of these proceedings.

Some additional considerations must be weighed with respect to plaintiffs' claim that the Income Protection Plan of Defendant company is discriminatory to female employees.

The Company provides its employees with a contributory insurance plan for continuation of income for a "long term illness", i.e. an illness requiring treatment by a doctor of eight or more calendar days which causes absence from work. Such "benefits are not payable for disability due to occupational injury or to sickness covered under Workmen's Compensation Insurance; for disability due to pregnancy; for a disability in excess of 104 weeks; or for a disability during which you were not treated by a physician licensed to practice medicine."

Pregnancy is the only disability, not within the other exceptions, not covered by the Income Protection Plan. Pregnancy is a condition limited to women. Conditions limited to men, such as prostate troubles, are not excluded, nor is any exclusion provided for a number of illnesses whose incidence among males is greatly predominant (i.e. gout 19 to 1; the Merck Manual, 10th ed. 1961).

The brief of the United States Chamber of Commerce as amicus curiae cites cost of the program if pregnancy were included, as a justification for exclusion.

We must emphasize the distinction made by the Guidelines, § 1604.10(b) that it is "disabilities caused or contributed by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom" which for job-related purposes are to be treated as temporary disabilities. They do not cover leave for child rearing, but only for job disability. No evidence has been presented to us by Defendant as to the average duration of pregnancy disability. Again, we have a difficult time in freeing ourselves from stereotype thinking. We note that the Defendant's policy for maternity leave prior to delivery has accommodated itself from a fixed number of months prior to delivery to the recognition that an employee may work prior to delivery as long as she is able to do the job. Return to work may be made as soon after

delivery as she is able to do the job. We may assume from a general knowledge of the conditions of life, that in the normal or usual pregnancy, the period of disability will be relatively short. There is nothing in this record to show, and nothing in our general experience with life indicates that the job-related incidence of disability for pregnancy is any greater or any less than that for a prostatectomy.

The EEOC Guidelines provide, § 1604.9 Fringe Benefits, (e):

"It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other."

While cost may be a business purpose, and certainly to add pregnancy disability to the insurance program will cost more, it can only be a defense in a Title VII action where

"... there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact, the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact. (footnotes omitted.) *Robinson v. Lorillard Corporation*, 444 F.2d 791, 798 [4th Cir.1971].

With respect to the argument of increased costs there is no statutory requirement that Defendant company offer any particular disability benefits, in any specific amount, or of any particular duration. The only requirement is that there be no inequality based on sex. Adjustments in the benefit

plan to achieve equality are a recognized means of achieving that end. *Rosen v. Public Service Electric Co.* cit supra (p. 95); *Hays v. Potlatch Forests, Inc.*, 465 F.2d 1081 [8th Cir.1972].

"The increased costs could be accommodated quite easily by making reasonable changes in the contribution rate, the maximum benefits allowable, and the other variables affecting the solvency of the program." *Aiello v. Hansen*, 359 F.Supp. 792, at p. 798 [N.D.Cal.1973].

A final requirement for a finding of violation of Title VII is that the court must find that defendant "has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint" in order to issue an injunction or to order such affirmative action as may be appropriate. While we are not now concerned with any question of relief in which the questions of back pay or reinstatement may be considered, certain continuing policies of defendant are subject to immediate injunctive relief, and require a finding of intentional action. Defendant has raised no question of intentional violation, except as to its defense of good faith reliance on administrative interpretation which we have found insufficient. The term "intentional" in this Act means that the Defendant intended to do what it did, not that there was a wilful and deliberate intention to violate the law.

"... intentional unfair employment practices are those engaged in deliberately and not accidentally. No willfulness on the part of the employer need be shown to establish a violation of Sec. 706(g)." *Kober v. Westinghouse Electric Corp.*, 408 F.2d 240, 246 [3rd Cir.1973].

We, therefore, find that the violations of Title VII of the Act herein charged were intentional within the terms of that statute.

We, therefore, conclude that as to the issues raised by Plaintiffs' Motion for Partial Summary Judgment, there is no genuine issue as to material fact and that summary judgment interlocutory in character should be entered on those issues.

Because the evidentiary materials show that at certain times subsequent to the effective date of the Act, or subsequent to the filing of the administrative charge or the within Complaint the Defendant has ceased or discontinued the discriminatory practice, injunctive relief is not appropriate as to those practices. *Kober v. Westinghouse Elec. Co.*, supra, p. 250.

As to continuing practices which violate Title VII preliminary injunctive relief at this time is appropriate.

The question of other affirmative relief for past actions is not now before us. The Court is mandated to issue "such affirmative relief as may be appropriate". *Kober*, cit supra. This will depend upon the evidence to be presented on the individual claims, which may be considered at the time of trial of the "equal pay" issue not here considered.

ON MOTION TO RECONSIDER

The Defendant Liberty Mutual Insurance Company has moved the court to reconsider that portion of its Order of January 9, 1974, that found that the Defendant's policy of requiring female employees to return to work within three months of delivery or be terminated and its policy of denying the benefits of the disability income protection plan to female employees for any disability related to pregnancy or childbirth are violations of Title VII of the Civil Rights Act of 1964.

Defendant brings to our attention the decision of the Northern District of Georgia in *Newmon v. Delta Air Lines, Inc.*, Civil Action No. 15681, issued December 31, 1973 of which this court was unaware at the time of its January 9,

1974 order. We have considered that Opinion and its Findings which, in many parts are in complete accord with the Findings of this Court. However, we do disagree with the Finding of that court that pregnancy is not a "disability".

We do note that the decision in *Newmon v. Delta Air Lines, Inc.* was made after a consideration of a great deal of evidentiary material presented by both parties in that case concerning working conditions, the type of work performed, the preference of the woman, the accessibility of a hospital, and, of course, the possibility of complications to both mother and child in pregnancy cases. The court also considered whether or not the defendant Airlines maternity leave policy was "reasonably necessary to the normal operation of the airlines business".

The remainder of Defendant's motion continues the argument that it is impossible for Defendant to present any statistical material of the cost of extending disability benefits to pregnancy because no statistics are available. Whether such statistics are available or not, the Defendant made no attempt to produce any such evidence before this court. The court cannot understand why the disability from performing work due to pregnancy or childbirth cannot be medically determined in the same way that disability from performing work is medically determined in all other disability cases. For a half century or more in this country, and for over a century in European countries, these matters are decided in hundreds, if not thousands, of cases daily.

Finally, the Defendant argues that "because employees can, in some situations, make as much or more money by receiving disability income it can be assumed that females on pregnancy leave of absence will remain at home longer than normal." The Defendant presented absolutely no evidence to support this argument and as a trial judge who has seen hundreds of cases of soft tissue damage arising from

the so-called "whip lash" type of injuries which produce few observable objective symptoms the court sees no basis for assigning the tendency to malingering as a sex-related characteristic. If, as defendant suggests, the employee can make as much or more money on disability than at work be true, then the fault lies with the particular insurance plan and not with the female sex. The motion for reconsideration will be denied.

In its Order the court stated it would enjoin the continuance of practices which the court found to be in violation of Title VII. The Plaintiffs were invited to submit the form of the injunction order and the Defendant has filed Notice of Appeal and asked for stay of any injunctive order. Under these circumstances the court will withhold the issuance of the injunctive order and amend the Order previously issued under the provisions of Fed.R.Civ.P. 54(b), as follows:

And now this 20th day of February, 1974, it is directed that final judgment be entered in favor of Plaintiffs that Defendant's policy of requiring female employees to return to work within three months of delivery of a child or be terminated is in violation of the provisions of Title VII of the Civil Rights Act of 1964; that Defendant's policy of denying disability income protection plan benefits to female employees for disabilities related to pregnancies or child-birth are in violation of Title VII of the Civil Rights Act of 1964 and that it is expressly directed that Judgment be entered for the Plaintiffs upon these claims of Plaintiffs' Complaint; there being no just reason for delay.

IN THE
United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

SANDRA WETZEL and MARI ROSS, on
behalf of themselves and others
similarly situated

Plaintiffs

vs.

LIBERTY MUTUAL INSURANCE
COMPANY, a corporation

Defendant

Civil Action
No. 72-169

ORDER

NOW this 9th day of January, 1974, Plaintiffs having moved for partial summary judgment on certain of the issues raised by the pleadings in this case, and having produced evidentiary materials in support of said motion, and the Defendant having responded, and the court having reviewed briefs and arguments of the parties and of the *amici curiae*,

The court finds that there is no genuine issue of material fact as to the issues hereinafter set forth, and that partial summary judgment, interlocutory in character, on the following issues of fact may be entered as a matter of law, it is

Therefore ORDERED, in accordance with the foregoing Opinion, that Defendant be found to have violated the provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000 (e) et seq., and Sec. 703 (a)(1) of said Title VII, in that Defendant has failed or refused to hire and has otherwise discriminated against Plaintiffs and members of

the class of female technical employees of the Claims Division of the Liberty Mutual Insurance Company because of their sex in the following respects:

1. From and after July 2, 1965 it failed and refused to hire otherwise qualified female applicants for the entry level position of "Claims Adjuster" in its Claims Department.

2. From and after July 2, 1965 it failed and refused to transfer or promote otherwise qualified female applicants from the position of "Claims Representative" to the position of "Claims Adjuster" in its Claims Department.

3. From and after July 2, 1965 it failed and refused to promote otherwise qualified female employees to the position of "Claims Supervisor" and positions superior to that position in its Claims Department.

4. That from and after July 2, 1965 the Defendant Company failed and refused to allow pregnant employees, otherwise able to perform the duties of their employment, to continue their employment beyond a certain term of their pregnancy, after which their employment was terminated.

5. That the violations of Title VII found in paragraphs 1, 2, 3, and 4 above have ceased as a matter of Company practice and no injunctive relief with respect to these issues is appropriate.

6. That from and after July 2, 1965 the Defendant Company required female employees to return to work within three (3) months of delivery or within six (6) months of the start of maternity leave, or be dismissed from employment, without regard to their ability to perform the duties of their employment.

7. That from and after July 2, 1965 the Defendant Company denied the benefits of the disability income protection plan to female employees who otherwise met the

conditions of the plan for any disability related to pregnancy or childbirth.

8. That the violations of Title VII recited in paragraphs 6 and 7 above are continuing violations and are the proper subject of injunctive relief. The court will consider the terms of any proposed preliminary injunctive order with respect to these violations submitted by the Plaintiffs in this case.

9. The questions of further appropriate relief to the individual Plaintiffs and members of their class will be determined by the court in further proceedings.

10. The question of liability and appropriate relief for the issue of equal pay for equal work between male and female employees is reserved for further proceedings.

/s/ GERALD J. WEBER

GERALD J. WEBER
United States District Judge

DEC 16 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1977

No. 77-338

SANDRA WETZEL and MARI ROSS, on behalf
of themselves and all others similarly situated,

Petitioners,

v.

LIBERTY MUTUAL INSURANCE COMPANY,
a corporation,

Respondent

SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

HOWARD A. SPECTER

MICHAEL D. BUCHWACH

LITMAN LITMAN HARRIS

& SPECTER, P.A.

1701 Grant Building

Pittsburgh, Pennsylvania 15219

ROBERT F. STONE

FINE, PERLOW AND STONE

1531 Frick Building

Pittsburgh, Pennsylvania 15219

Attorneys for Petitioners

**In the
Supreme Court of the United States**

October Term, 1977

No. 77-338

**SANDRA WETZEL and MARI ROSS, on behalf of
themselves and all others similarly situated,**
Petitioners,

v.

LIBERTY MUTUAL INSURANCE COMPANY,
a corporation,
Respondent

**SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

INTRODUCTION

On September 2, 1977, Petitioners, Sandra Wetzel and Mari Ross, on behalf of themselves and all others similarly situated, filed a petition praying that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit. A memorandum in opposition was filed on behalf of Liberty Mutual Insurance Company ("the Company"). Thereafter, on December 6, 1977, this Court decided *Nashville Gas Co. v. Satty*, 46 U.S.L.W. 4026 (U.S. 1977). Because the application of *Satty* mandates the issuance of a writ in this case, Wetzel and Ross submit this supplemental brief in support of their petition pursuant to Rule 24(5) of this Court's Rules.

ARGUMENT

The Court of Appeals Has Decided Important Questions of Federal Law in a Way in Conflict With Applicable Decisions of This Court.

Only one conclusion can be drawn from an application of *Satty* and *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), to the Third Circuit's opinion with respect to the violation of Title VII alleged in this case. That decision is clearly contrary to federal law. The court of appeals denied Petitioners the opportunity to demonstrate "through the presentation of other evidence . . . that exclusion of pregnancy from the compensated conditions is a mere '[pretext] designed to effect an invidious discrimination against the members of one sex or the other . . .'" *Satty, supra*, at 4028. It is now this Court's duty to rectify the lower court's error. The court of appeals erroneously concluded that the similarity between the Company's Income Protection Plan and the disability insurance program in *Gilbert* foreclosed further inquiry into the merits of Petitioners' claims (3a). *Gilbert* discloses only the initial step in the analysis, however. As Justice Rehnquist analyzed the Court's earlier ruling in *Gilbert*:

We of course recognized in both *Geduldig v. Aiello*, 417 U.S. 484 (1974), and in *Gilbert, supra*, that the *facial neutrality of an employee benefit plan would not end analysis . . . Satty, supra*, at 4029. (Emphasis supplied.)

Satty is also controlling on the question of the relevance of the Company's other discriminatory pregnancy-related and hiring and promotion practices. Unlike the case in *Satty*, where the district court had determined that certain of Nashville Gas Company's other practices passed muster under Title VII, the district court in this case concluded that the Company's mandatory discharge, leave and return date practices, which applied only to pregnancy-related disabilities, were all unlawful (43a). The court of appeals affirmed the district court's decision on the mandatory

return date, the only issue which the Respondent presented to it. *Wetzel v. Liberty Mutual Insurance Co.*, 511 F.2d 199 (3d Cir. 1975), *vacated on jurisdictional grounds*, 424 U.S. 737 (1976). Petitioners therefore have demonstrated that at least five of their employer's practices constitute prohibited sex discrimination. The court of appeals reviewed the policy which is before the Court in isolation, however. In *Satty*, this Court held:

Petitioner's refusal to allow pregnant employees to retain their accumulated seniority may be deemed relevant by the trier of fact in deciding whether petitioner's sick-leave plan was . . . a pretext. *Satty, supra*, at 4029.

Satty thus allows an aggrieved party to present evidence of other discriminatory practices in order to demonstrate that a challenged practice is also unlawful. In light of *Satty*, as well as this Court's other decisions concerning methods of proof in a Title VII action, Petitioners are entitled to proceed on the merits.

In *Satty*, the Court appears to have limited its remand due to the fact that the action had been instituted and the issues framed after the decision in *Geduldig v. Aiello*, 417 U.S. 484 (1974). No justification exists for imposing a similar limitation in this case. Petitioners commenced this action in February, 1972. Their motion for partial summary judgment was filed before discovery was closed and was granted in January, 1974, long before *Aiello*. After the remand in this case, they urged the court of appeals to uphold the summary judgment or, if the court concluded that summary judgment had been granted prematurely, to afford them an opportunity to develop the record and proceed to trial on the merits. Instead, the court simply concluded that *Gilbert* was controlling, refused to consider the Respondent's other discriminatory practices and vacated the judgment. Petitioners were denied the opportunity to present to the trier of fact the very case which *Gilbert* and now *Satty* give

them the right to present. Petitioners now should be permitted to prove a gender-based discriminatory effect as well as a gender-based discrimination.

CONCLUSION

Satty has confirmed the accuracy of Petitioner's previously stated contention that *Gilbert* did not hold that the exclusion challenged here is *per se* immune from Title VII attack. If this Court declines to grant the requested writ, this case, which Petitioners have litigated vigorously and in keeping with every established and evolving principle of Title VII law for nearly six years, will slip into anonymity without even the opportunity for a fair adjudication on the merits. If Petitioners are denied an opportunity to present their case to a trier of fact at this juncture, it will be only because they litigated too soon and too well in an early Title VII era. Their cause, which may be of little lasting moment to this Court, will be lost, and the answer to Mr. Justice Stevens' inquiry in *Satty* clearly will be "never." Not one member of this Court has suggested the propriety of that answer.

Sandra Wetzel and Mari Ross, on behalf of themselves and all others similarly situated pray, therefore, that their Petition for a Writ of Certiorari be granted, and that the judgment of the court of appeals at least be vacated with instructions that the cause be remanded to the district court for further consideration in light of *Satty*.

Respectfully submitted,

HOWARD A. SPECTER
MICHAEL D. BUCHWACH
LITMAN LITMAN HARRIS
& SPECTER, P.A.

1701 Grant Building

Pittsburgh, Pennsylvania 15219

ROBERT F. STONE
FINE, PERLOW AND STONE
1531 Frick Building
Pittsburgh, Pennsylvania 15219

Attorneys For Petitioners

OCT 8 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-338

SANDRA WETZEL AND MARI ROSS, ON BEHALF OF
THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

vs.

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,

Respondent.

**MEMORANDUM ON BEHALF OF LIBERTY MUTUAL
INSURANCE COMPANY IN OPPOSITION TO
TO PETITION FOR CERTIORARI**

KALVIN M. GROVE
RONALD S. SHELDON
LEDERER, FOX AND GROVE
233 South Wacker Drive
Chicago, Illinois 60606

ROBERT A. PENNEY
175 Berkeley Street
Boston, Massachusetts 02226

CLEM R. KYLE
4150 U. S. Steel Building
Pittsburgh, Pennsylvania 15219
*Attorneys for Liberty Mutual
Insurance Company*

IN THE
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OCTOBER TERM, 1977

No. 77-338

SANDRA WETZEL AND MARI ROSS, ON BEHALF OF
THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

vs.

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,

Respondent.

**MEMORANDUM ON BEHALF OF LIBERTY MUTUAL
INSURANCE COMPANY IN OPPOSITION TO
PETITION FOR CERTIORARI**

Respondent Liberty Mutual Insurance Company ("Liberty") respectfully prays that this Court deny Petitioners' petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on July 1, 1977.

**REASONS WHY THE WRIT SHOULD
NOT BE GRANTED**

Petitioners predicate their petition on two premises: *first*, that in considering the legality of a disability income plan, that plan cannot be severed from other purportedly discriminatory employment practices of the Employer; and *second*, that Petitioners never had an opportunity to demonstrate whether,

in fact, Liberty's disability income plan had an adverse effect on female employees.

1. The Court of Appeals found that Liberty's "income protection plan is clearly severable from the hiring and promotion practices" of Liberty. Pet. App. at 3a. The Court of Appeals noted that, in enjoining Liberty from using an income protection plan which "treated" pregnancy related disabilities differently from other disabilities, the District Court "demonstrate[d] no difficulty in separating the disability plan from other issues in the litigation." *Ibid.* Accordingly, since "[t]he plan under consideration [in *General Electric Co. v. Gilbert*, 429 U. S. 125 (1976)] is indistinguishable in any relevant provision from that offered by Liberty Mutual",¹ the court below concluded that "*Gilbert* requires that we . . . enter judgment for the defendant on the disability income issue." *Ibid.* Neither of these *factual* conclusions are or could be controverted by the Petitioner. The Court of Appeals' application of the law to these facts not only conformed to this Court's holding in *Gilbert*, but also with the current position of the Equal Employment Opportunity Commission.²

2. Petitioners heretofore have treated the question of the lawfulness of Liberty's disability income plan as "ripe for summary judgment" since the inception of this lawsuit,³ and have

1. *Gilbert* and this case were argued together before this Court in the October, 1975 term, but this case was thereafter remanded to the Court of Appeals with instructions to dismiss the appeal for want of an appealable order. *Liberty Mutual Insurance Co. v. Wetzel*, 424 U. S. 737 (1976). *Gilbert* was then reargued in the following term. After remand but prior to *Gilbert*, the District Court issued an appealable order enjoining enforcement of Liberty's plan which, in turn, was vacated by the court below after *Gilbert* and is now the subject of the instant petition.

2. Subsequent to *Gilbert*, the Commission now automatically issues a no-cause finding with respect to charges raising *Gilbert*, Liberty-type disability income plan issues, treating such issues as severable from all others. See Addendum to Brief in Opposition, attached hereto.

3. Brief for Appellees, *Wetzel v. Liberty Mutual Insurance Co.*, 511 F. 2d 199 (3rd Cir. 1975), at p. 3. The District Court also

(Footnote continued on next page.)

never attempted to proffer evidence as to the alleged adverse effect of Liberty's plan upon females, although they have always had the opportunity to do so. The time for presentation of such evidence, if it existed, has thus long since passed. The instant case, accordingly, is in the same posture as *Gilbert*, where this Court noted the same lack of proof. 97 S. Ct. at 406, and n. 11 at 406. This factor, however, did not prevent this Court from deciding, as it did, that General Electric's "disability benefits plan does not violate Title VII because of its failure to cover pregnancy-related disabilities." *Id.* at 413. The instant case, as the court below concluded, should be treated no differently.

The United States Court of Appeals for the Third Circuit correctly held that this Court's decision in *General Electric Co. v. Gilbert*, *supra*, is "dispositive of the issues raised in the case *sub judice*."⁴ The petition for writ of *certiorari* should be denied.

Respectfully submitted,

KALVIN M. GROVE
RONALD S. SHELDON
LEDERER, FOX and GROVE
233 South Wacker Drive
Chicago, Illinois 60606

ROBERT A. PENNEY
175 Berkeley Street
Boston, Massachusetts 02226

CLEM R. KYLE
4150 U. S. Steel Building
Pittsburgh, Pennsylvania 15219
*Attorneys for Liberty Mutual
Insurance Company*

(Footnote continued from preceding page.)

treated the case as proper for summary judgment (Pet. App. at 43a-44a) and found "no disputed issue of fact" (Pet. App. at 23a), a finding which Petitioners did not contest on appeal.

4. Pet. App. at 2a.

A1

ADDENDUM

NOTICE

Number 915

Date 12/30/76

(Automatically Canceled in Ninety Days)

1. **SUBJECT. PROCEDURES FOR PROCESSING PREGNANCY RELATED ALLEGATIONS OF SEX DISCRIMINATION**
2. **PURPOSE.** This notice establishes the procedure for processing charges of sex discrimination in light of *General Electric Co. v. Gilbert*, 45 U. S. L. W. 4031 (December 7, 1976).
3. **ORIGINATOR.** Office of Compliance Programs.
4. **EFFECTIVE DATE.** January 3, 1977.
5. **RESPONSIBILITIES AND PROCEDURES.** In order to implement the United States Supreme Court's decision in *General Electric Co. v. Gilbert*, 45 U. S. L. W. 4031 (December 7, 1976), the Commission directs that the following procedures be followed in processing charges which allege *discrimination because pregnancy or maternity claims are treated differently by a respondent from other claims under temporary disability or health benefit programs* (hereinafter referred to as "*Gilbert* allegations"):
 - a. **New Charges**—Persons who make *Gilbert* allegations shall be counselled that no relief is available under Title VII. If such individuals exercise their rights to file charges which raise only *Gilbert* issues "no reasonable cause" Letters of Determination shall be issued immediately after the charges are formally filed. (See attached suggested LOD language)

All charges containing *Gilbert* allegations and other allegations of discrimination will be processed routinely as to the other issues. Except where Charging Party indicates in writing a desire that the *Gilbert* allegations not be pursued, the Letter of Determination will address the *Gilbert* issue and find no reasonable cause.

- b. *Charges Pending Letters of Determination*—All *Gilbert* allegations in open charges shall be resolved by finding that there is not reasonable cause to believe that Title VII has been violated. (See attached)
- c. *Charges Pending Conciliation Efforts*—"Reasonable cause" determinations on charges containing *Gilbert* allegations, which are being conciliated or are pending conciliation, shall be reconsidered and amendments to existing Letters of Determination shall be issued finding no reasonable cause exists as to the *Gilbert* allegations. Where reasonable cause had been found on *Gilbert* allegations and other issues, conciliation efforts shall not proceed prior to the issuance of an amendment to the existing Letter of Determination. (See attached.)
- d. *Charges Pending Litigation Review*—No action shall be taken by District Offices with respect to charges containing *Gilbert* allegations which are being processed by the Office of the General Counsel or the Department of Justice unless such charges are returned to the District Office. If such charges are returned, an amendment to the existing Letters of Determination shall be issued finding no reasonable cause as to the *Gilbert* allegations. Where such charges contain non-*Gilbert* allegations on which reasonable cause has been found, the District Office must offer respondents a new opportunity to conciliate these issues in accordance with 29 C. F. R. § 1601.22 and § 1601.23.
- e. *Closed Charges*—Where the Commission has terminated its processing of a charge containing *Gilbert* allegations

and has issued a notice of Right-to-Sue to the aggrieved person or persons, no further action needs to be taken with respect to such a charge notwithstanding the determination that was made on the *Gilbert* allegation.

- f. *Conciliated Charges*—District Offices shall continue to monitor the performance of respondents under conciliation agreements which require that pregnancy or maternity claims be treated in the same manner as other claims under a temporary disability or health benefit program because *General Electric Co. v. Gilbert* does not make such agreements unlawful.
6. The Commission has determined that distinctive treatment of pregnancy or maternity in the following situations continues to be unlawful because these criteria have a disproportionate impact on women and are therefore gender based or are by their terms gender based:
- a. refusals to hire, train, assign or promote pregnant women
 - b. refusals to hire, train, assign or promote married women
 - c. refusals to hire, train, assign or promote women of child-bearing age
 - d. mandatory maternity leaves for predetermined time periods
 - e. dismissals of pregnant women
 - f. denials of reemployment rights to women on leave for pregnancy-related reasons
 - g. denials of unemployment benefits to pregnant women
 - h. denials of seniority or longevity credit to women on leave for pregnancy-related reasons
 - i. denials of accrued leave to pregnant women who have worked less than a stated time period
 - j. payment of lower periodic amounts to retired women according to sex-segregated actuarial tables

- k. denials of disability or medical benefits for disabilities which are unrelated to pregnancy or childbirth, whether or not they occur during a pregnancy, childbirth, or recovery from childbirth.
7. District Directors will, therefore, continue to make determinations on charges involving the above criteria in the circumstances permitted prior to the Supreme Court's decision, except for (k), above. If the criteria in (k) applies, District Offices must contact Decisions Division in the same manner as with other non-CDP cases.

Attachments

Appendix A, WMS Procedures

Appendix B, CSRS Coding Instructions

Approved: /s/ EDUARDO PENA, JR.

Director, Office of Compliance Programs

[Attachments omitted]